

MINUTES

KENTUCKY WORKERS' COMPENSATION REGULATORY ADVISORY COMMITTEE

INITIAL MEETING JUNE 19, 2018

The initial meeting of the Regulatory Advisory Committee (RAC) was held on June 19, 2018, beginning at 1:00 p.m., in the Oscar Morgan Conference Room at the Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky.

All committee members were present in-person. From the Kentucky Department of Workers' Claims (DWC) were Douglas W. Gott, Chief Administrative Law Judge; John B. Coleman, Administrative Law Judge; Chris Davis, Administrative Law Judge; and B. Dale Hamblin, Jr., Esq., Staff Attorney Manager/Assistant General Counsel. Other members present were Peter Naake, Esq.; Kenneth J. Dietz, Esq.; Scott M. Miller, Esq.; and Timothy Feld, Esq.

Also in attendance was Robert Swisher, Commissioner of the Kentucky Department of Workers' Claims, who welcomed everyone to the meeting. The Commissioner introduced himself and noted that the meeting is held in accordance with KRS 61.823(4)(a), the Open Meetings statute, and that notice of the meeting was published as required. He thanked all of the members for their willingness to participate and give of their time.

The members of the committee introduced themselves. Douglas Gott is currently Chief Administrative Law Judge at the DWC, and has been an ALJ for 10 years. He works in Bowling Green and in Frankfort. John Coleman is an ALJ from Pikeville. Chris Davis is from Louisville and has been an ALJ for 12 years. Dale Hamblin is Assistant General Counsel and has worked for the DWC since 2006. Peter Naake is an attorney from Louisville who represents plaintiffs in workers' compensation claims. Kenneth Dietz has been an attorney for 30 years and practices defense law in workers' claims cases. Scott Miller has been an attorney for 41 years and represents plaintiffs. Timothy Feld has been an attorney for 15 years, previously practiced defense law and is currently in-house counsel for KEMI.

Secretary David Dickerson addressed the committee and thanked them for giving of their time and talents to helping the citizens of Kentucky.

Commissioner Swisher introduced Deputy Commissioner Robert Milligan who is also involved with the Medical Advisory Committee.

Commissioner Swisher stated that the purpose of the RAC is to meet the challenge of developing regulations consistent with the statutory changes set out in House Bill 2. There are three main issues to be addressed by this committee. One of the changes brought about in House Bill 2 consists of a change in KRS 342.020 which includes termination of medical benefits for a claimant after 780 weeks unless application for an extension of benefits is made. This committee must determine the process of application, and the process of substantive adjudication of an application. Commissioner Swisher asked the members of the committee to look at this process reasonably and logically in order to give their best effort to meeting the needs of the people of the Commonwealth.

The second issue is to determine regulations to implement the pharmaceutical formulary that will be developed by the Medical Advisory Committee. The regulations establishing and implementing the formulary must be filed by December 31, 2018. Processes must be developed to address the steps for prior approval when necessary, medical review and resolution of disputes arising from a denial of medical benefits to a claimant.

The third issue is to determine how the medical treatment guidelines, also to be developed by the Medical Advisory Committee, will be implemented for all participants.

Commissioner Swisher noted that the Medical Advisory Committee is a parallel group consisting of healthcare providers who will determine the substance of the pharmaceutical formulary and treatment guidelines. This group held its first meeting on May 29, 2018, to establish the goals to reach a consensus and make recommendations on how to proceed. The RAC will take the recommendations adopted by the MAC to develop a system to work in real time. Commissioner Swisher indicated that developing the best procedural framework possible will be needed to meet the mandates of House Bill 2. Although the committee will present its recommendations, the final decision will be the Commissioner's, and he is relying on their guidance and counsel to make the proper choices. He told the committee that 1.9 million people go to work each day in Kentucky, and 300,000 employers open their doors for business, so it is important that this committee "get it right". He then turned the meeting over to Judge Gott.

Judge Gott emphasized that all voices on the committee are equal. Each committee member had available to him the email addresses of all members, a list of the issues to be addressed, and the deadlines set out for preliminary submission to LRC.

Judge Gott noted that KRS 342.020 will require that a claimant make application for extension of medical benefits beyond 780 weeks, and without action taken by a claimant, medical benefits will terminate at the end of the 780-week period. House Bill 2 requires that the Commissioner notify a claimant within 180 days before the date benefits will expire. A claimant may file for extension of benefits within 75 days of the date of expiration, and must show that the extension of benefits is reasonable and necessary. An administrative law judge will make a determination on the application.

KRS 342.270 sets out that within 120 days the Commissioner shall establish regulations on filing extensions for medical benefits. House Bill 2 goes into effect July 14, 2018, making the deadline for establishing the regulations November 12, 2018. Judge Gott emphasized that this is not a long time for the committee to address the issues. He set out the three issues to be addressed, one of which is DWC notification to a claimant and the anticipated problems of stale addresses. The manner of filing must also be established, i.e., whether a claimant may file via paper or through the LMS system, and in what form that filing should be prepared. The procedural requirements of advancing an application must be set out with specifics by this committee including issues of service on opposing parties, response times, discovery, scheduling of conferences and/or hearings, and docketing of claims. The committee will also address whether termination of benefits will be stayed pending adjudication of an application and the issuance of orders and opinions in those claims.

KRS 342.035(8)(b) addresses implementation of a pharmaceutical formulary. Judge Gott noted that a “closed” formulary is the most common type adopted by other states which consists of placing a status on each drug as being “Y”, authorized, or “N” not authorized or requiring pre-authorization before dispensing. He noted that all medications are subject to utilization review and medical dispute at any time regardless of whether or not an extension of benefits has been granted. Judge Gott also noted that medical dispute regulations are currently in place at 803 KAR 25:012, and may or may not need to be amended when the recommendations are presented.

Dispute over a drug from the formulary does not necessarily mean that it cannot be prescribed, and this committee will propose a process for determining whether a prescription will or will not be filled. Common issues to be addressed include whether a “first fill” mechanism will be placed which automatically allows a claimant to obtain a medication until it can be established whether or not it is reasonable and necessary. Determining the status of “legacy claims”, or claims involving injuries prior to the effective date of the formulary must also be addressed. Judge Gott anticipated a grace period for transitioning these legacy claims but the time limit is to be determined by the committee.

Judge Gott noted that these recommendations must be adopted by December 31, 2018, with the implementation date to be determined by the Commissioner. He also noted there are stakeholders who have an interest and will be seeking education and training, and although this is not a task to be taken on by this committee, he expressed the hope that this committee will be a leader in making some of those determinations.

Judge Gott also presented each committee member with a copy of regulations adopted by the states of Tennessee and Texas, both of which have previously done the work and can be used as models for this committee. He noted that this committee is “project specific” in that it is to address the three goals set before it. He noted that due to the time constraints, committee members will need to do independent research to bring back to the group.

A short discussion regarding frequency of meetings and establishing groups followed. Judge Gott assigned Judge Coleman, Mr. Feld and Mr. Miller to a subgroup addressing the issues of the application process for a continuation of medical benefits beyond 780 weeks. This subgroup will also address drug formulary issues with regard to the process of dispute resolution.

Judge Davis, Mr. Dietz and Mr. Naake will form a subgroup to address the processes of discovery and scheduling for continuation of medical benefits beyond 780 weeks. Drug formulary issues of first fill and legacy claims will be address by this subgroup as well.

Mr. Hamblin and Judge Gott will discuss DWC notification issues. Judge Gott also indicated he will work with both subgroups while Mr. Hamblin will be charged with getting the recommendations in the proper format of regulations for submissions to LRC.

Commissioner Swisher encouraged the committee to look closely at the wording in House Bill 2 to ensure that their recommendations meet the mandates set out therein. He noted that the committee needs to comply with the intent of House Bill 2 as it currently exists. He told the committee that the pharmaceutical formulary is another aspect of the treatment guidelines to be developed later, but that the processes are similar.

Judge Gott requested that the committee reconvene in three weeks. Commissioner Swisher noted that in accordance with the Open Meeting statute, a member of the committee must be present in person or via video conference, and that DWC has the capability of setting up video conferencing if needed. Participation via telephone call-in does not constitute a presence at a meeting with respect to whether or not a quorum is established.

Judge Gott indicated that no public comments would be accepted at this meeting but will be encouraged at future meetings. Notice of the next meeting will be sent when the dates and times are confirmed.

Mr. Miller asked if the committee members are able to discuss the issues with people outside of the committee, and Commissioner Swisher was of the opinion that they could. Commissioner Swisher stated he is unaware of any prohibition against talking with people outside of the committee.

Mr. Feld asked what Judge Gott expected from the subgroups at the next meeting. Judge Gott indicated he would like to hear an oral report, and the subgroups were welcome to prepare written updates if they felt such were necessary. He left the substance and formatting of the reporting to the individual groups.

Commissioner Swisher told the committee that presentations from outside groups may be scheduled, if desired. He noted that the state of Montana is currently working on their own processes for implementation of guidelines already adopted, and that many other states have recently adopted guidelines or are currently in the process of developing guidelines. Much of this information is available on-line, and he encouraged members of the committee to look them up.

Judge Coleman moved for adjournment, seconded by Mr. Hamblin. The meeting was adjourned at 2:10 p.m.